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402318—41

# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 196

H. W. FERGUSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 528–30) is reported in 119 F. (2d) 582. The opinion of the court on a prior appeal is reported in 112 F. (2d) 132.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 6, 1941 (R. 530) and a petition for rehearing was denied May 31, 1941 (R. 556). The petition for a writ of certiorari was filed June

20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

**QUESTIONS PRESENTED**

1. Whether there was sufficient evidence, that petitioner had converted to his own use money of the joint stock land bank, to warrant submission of the case to the jury.

2. Whether the trial court erred in its instructions to the jury.

**STATUTE INVOLVED**

Section 31 of the Federal Farm Loan Act, c. 245, 39 Stat. 360, 382 (12 U. S. C., § 984) provides:

> Any person connected in any capacity with any * * * joint stock-land bank, who embezzles, abstracts, or wilfully misapplies any moneys, funds, or credits thereof * * * with intent * * * to defraud such institution * * * shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding five years, or both.

**STATEMENT**

On September 18, 1939, petitioner, together with one Craddock, was indicted in the United States District Court for the Northern District of Texas. The indictment was in six counts and charged a

conspiracy to violate and violation of Section 31 of the Federal Farm Loan Act (12 U. S. C. § 984) by feloniously abstracting and converting to petitioner's own use moneys belonging to the Dallas Joint Stock Land Bank, of which he was president (R. 1–11). After conviction on the first trial, the circuit court of appeals reversed and ordered a new trial because of faulty instructions. *Ferguson* v. *United States,* 112 F. (2d) 132 (C. C. A. 5th). On retrial there was a second verdict of guilty, and petitioner was sentenced generally on all counts to imprisonment for eighteen months and a fine of $10,000 (R. 14–16). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 530).

The Government's case may be summarized as follows:

The land bank held a note of Carrie Berkman secured by a mortgage on her farm in Nueces County, Texas (R. 29, 90, 91). The loan became delinquent, and the bank pressed for payment (R. 25, 72, 92, 413). She offered to surrender the land for the debt (R. 29), but petitioner refused (R. 30). Thereupon Mrs. Berkman offered to pay $1,000 and give a deed to the property in cancellation of the indebtedness (R. 33).

Mrs. Berkman's farm was within "five miles of a big oil field" (R. 328, 438), and petitioner knew that there "was a right hot oil play down there" (R. 239). Upon receipt of her offer, peti-

tioner instructed the bank's attorney to accept it but "instead of having Mrs. Berkman deed the property directly to the bank," told him to "Have her deed it to a nominee for the bank, and we will give her a release of personal liability * * * on the payment of $1,000" (R. 239). Petitioner also instructed the attorney to designate as the "nominee" S. K. Fowler, a farmer on some of the bank properties nearby (R. 240), although Fowler knew nothing about the transaction (R. 170).

The attorney immediately complied with petitioner's instructions (R. 240) and advised Mrs. Berkman's attorney that if she would "convey the property free and clear of all liens to a nominee of the land bank and pay $1,000 the land bank will deliver to her a release of all personal liability on the note" (R. 33–34). This offer was accepted, and on March 30, 1937, Carrie Berkman conveyed her land to Fowler, subject to the bank's mortgage lien (Gov. Ex. 16, R. 83–84), and on April 5, 1937, the bank gave her a release (Gov. Ex. 11, R. 38–39).

Within three weeks thereafter, petitioner's brother-in-law, C. R. Craddock, who was employed as a field man by the bank (R. 318, 319),[1] negotiated an oil and gas lease on the property (R. 329) dated April 28, 1937 (Gov. Ex. 25, R. 180–187), for which he received a check for $2,400, payable to the order

[1] Craddock was indicted as a coconspirator, along with petitioner (R. 1–11), and was convicted at a prior trial, but did not appeal (R. 342, 427, 440).

of S. K. Fowler (R. 172, 329). At Craddock's direction, Fowler endorsed the check (R. 171) and Craddock remitted the full amount, less $12 expenses, to petitioner (R. 337). On July 23, 1937, Craddock negotiated a sale of the property to one Dutschmann (R. 332, 339), who paid $500 down to Fowler (R. 339), who turned the money over to Craddock (R. 174). Also upon Craddock's instruction (R. 338), Richter, a tenant on the premises while title was in Fowler (R. 175), deposited rental moneys in the amount of $514.64 to an account in the name of S. K. Fowler, who transferred the amount by check to Craddock (R. 175, Gov. Ex. 23, R. 177). By check dated November 9, 1937 (Gov. Ex. 24, R. 178–179) Fowler similarly transferred to Craddock $3,296.77, the balance of the purchase price deposited to Fowler's credit by the purchaser (R. 178).[2] Petitioner apparently admitted that either he or his wife eventually received all of these sums, which aggregated about $6,700 (R. 421).

The deed to Fowler did not name him as trustee or nominee for anyone (Gov. Ex. 16, R. 83–84). The Government introduced evidence to show that title was conveyed to him as nominee for the bank solely to prevent a merger of the mortgage and thus facilitate a possible future sale of the property, as the bank had done in hundreds of other cases

[2] In January 1938, Dutschmann, the purchaser, paid the bank loan in full (Deft.'s Ex. No. 3, R. 304, 135).

(R. 239–247, 251). Petitioner controverted this testimony, and contended that at the time the conveyance was made to Fowler he intended Fowler to act as nominee for his wife (R. 412–422).

## ARGUMENT

### I

The factual issue is whether Fowler held the land as the nominee of the bank or of petitioner's wife. If the bank were the equitable owner of the land, petitioner in converting the proceeds is punishable under Section 31 for abstracting the money of the bank. But, if Fowler held as the nominee of petitioner's wife, there was no conversion of the money of the bank and petitioner's offense may here be assumed not to be punishable under Section 31.

Petitioner contends that "as a matter of law" the uncontroverted evidence in the case proves that the land was not "the property of the Bank," and that therefore the trial court erred in refusing his request for a directed verdict (Br. 1–7). In support of his position, petitioner relies upon evidence which shows little more than the admitted fact that Fowler was the holder of the bare legal title to the property, and that the transaction was handled contrary to the customary practice of the bank in calling in delinquent real estate loans. Thus, he points out that legal title to the property was not conveyed to an employee of the bank; no deed was prepared conveying legal title to the bank and Fowler exe-

cuted none; the loan was not closed nor was the land put into the real estate account; the attorney for the bank asked petitioner if he or Fowler wanted an opinion as to Fowler's legal title; Mrs. Berkman's release recited that legal title "is now vested" in Fowler, subject to the bank's lien; the bank clerk made a notation of the change of titleholder on the loan record; and, Deutschmann, the ultimate purchaser, finally discharged the balance due on the Berkman note (Br. 2–5).

These circumstances, it may be assumed, constitute a factual basis from which the inference might be drawn that the interest of the bank in the property was no more than that of a lienholder.[3] But other evidence in the record which petitioner ignores, related directly to the ultimate issue of fact in the case, i. e., whether Fowler, in holding legal title "was in truth and in fact the nominee of the bank" (R. 466), and plainly required submission of the question to the jury. Thus, McCombs, the attorney for the bank who performed the legal services connected with the Berkman-Fowler

[3] Contrary to petitioner's impression (Br. 6), no one has contended that the bank "became the fee owner of the land" by virtue of the conveyance to Fowler. The indictment alleges that "Fowler was holding the title to said land in trust" (R. 4) and as the trial court charged, the bank acquired the "equitable ownership of the land" (R. 466). Indeed, that there should be no merger of the bank's title as lienholder in the "fee ownership," such as petitioner suggests, was the very purpose of resorting to the nominee device (R. 243–244, 248).

transaction, unequivocally testified that "instead of having Mrs. Berkman deed the property direct to the bank," petitioner instructed him to "Have her deed it to a nominee *for the bank*" (R. 239, 247, 251). McCombs immediately complied with these instructions (R. 240) and advised Mrs. Berkman's attorney that if she would "convey the property free and clear of all liens to a *nominee of the land bank* and pay $1,000" the bank would release her from all liability on the note (R. 33–34).[4] This testimony alone, although contradicted by petitioner, was clearly sufficient to send the case to the jury,[5] for, as the court below held "the credibility of the witnesses and the weight to be given to their testimony were questions exclusively for the jury" (R. 529).

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[4] McCombs testified that in preparing the conveyance to Fowler, he did not insert "nominee, trustee, or anything of that nature, after Mr. Fowler's name" for the reason that "I had studiously schooled myself not to use the word 'trustee' because I was very anxious never to get the land bank into a lawsuit over a parole trustee" (R. 241, 264).

[5] There is nothing in the record to support petitioner's assertion that "McCombs' testimony was so contradicted by all the facts proven in the case * * * as to be of no probative force, and not entitled to go to the jury for its consideration" (Br. 6). Petitioner's reference to the witness's testimony concerning his prior denial to Pope that Fowler was holding the land as trustee for the bank (Br. 4) omits the witness's explanation that the statement was technically true (R. 264) and that at the time it was made he believed that the transaction "was open and aboveboard in every respect" (R. 263).

The jury has decided the issue adversely to petitioner, and the Circuit Court of Appeals, after twice reviewing the evidence, has found it sufficient (R. 529; 112 F. (2d) 132). No reason appears why this Court should review it again. *Delaney* v. *United States,* 263 U. S. 586, 589–590.

## II

Petitioner contends that the trial court erred in its instructions to the jury (Br. 7–15). Upon the prior appeal, the conviction was reversed because the Circuit Court of Appeals was of the view that the judge's charge virtually instructed the jury that Fowler was in fact the nominee for the bank and not for petitioner or his wife (112 F. (2d) at 134–135). In the present case the Circuit Court of Appeals rejected petitioner's argument that the instructions given contain the same vice and held that the present charge "contains no error" prejudicial to petitioner's rights (R. 530).

1. At the first trial, the trial court charged that the uncontroverted evidence showed:

> That instead of conveying the land directly to the Bank they conveyed it to a person to be named by the Bank, called a nominee *for the Bank* * * *. [Italics added.]

The Circuit Court of Appeals criticized this instruction because "the jury were told in effect that Fowler took for the Bank and not for Ferguson" (112 F. (2d) 134). Petitioner complains that the

same instruction was given on the second trial (Br. 8). Then, however, the words "for the bank" were omitted, and the jury were simply told that the land "was to be conveyed to a person to be named by the bank, called a nominee" (R. 463), a fact which petitioner does not dispute.

2. Petitioner next complains (Br. 8–9) of the court's charge that

> The defendant Ferguson was President of the bank and as such was without power to take anything that was the bank's and name someone as trustee to hold for him personally or for his wife (R. 465).

The Circuit Court of Appeals criticized substantially identical language in the charge on the first trial, but only because contextually it implied that petitioner was without authority to designate Fowler as trustee for himself or his wife.[6] In the present case, however, at petitioner's request, the court charged the jury to acquit (a) if they did not believe "beyond a reasonable doubt that at the time" of the conveyance to Fowler, it was petitioner's then "intent and purpose" that the property should thenceforth be held by Fowler "as trustee for the land bank"; or (b) if they believed

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[6] It said (112 F. (2d) at p. 135):
"The last sentence, while true of anything that was really the Bank's, would be understood, in the connection in which it was spoken, as meaning that the land before it was deeded to Fowler was the Bank's, and Ferguson was therefore without power to make Fowler his trustee."

that petitioner collected and paid over the proceeds of the property to his wife "in good faith, believing that said moneys were the property of his wife" (R. 13, 14, 474). As the Circuit Court of Appeals pointed out, these instructions, which were not given at the prior trial, "stated the issues in a light most favorable to Ferguson" (R. 530) and certainly dispelled any inference that petitioner could not have designated Fowler as nominee for himself or his wife.

3. Petitioner (Br. 10–13) also challenges those portions of the trial court's charge wherein it is said that "One acting as President of a bank is not at liberty to deal with the property of the bank as though it were his own" (R. 468);[7] that it is presumed "that one intends the natural and probable effect of the act that he intentionally does" (R. 467); and that a verdict of guilty would be authorized if the jury should find that petitioner, knowing or believing that the land would yield a profit "caused it to be handled in the name of Fowler for the purpose of realizing this profit personally" (R. 468).[8] Petitioner does not attack any of these

[7] The analogy which likened petitioner's relationship to the bank to that of a guardian to his ward, condemned by the Circuit Court of Appeals as inapposite (112 F. (2d) 135), was omitted from the instruction in the instant case.

[8] The court also charged (R. 468): "On the other hand, if it was placed in Fowler's name for Mrs. Ferguson, in good faith, and handled as a bona fide transaction, and not as a subterfuge, it would not be an act of abstracting money from the bank."

elementary instructions as erroneous, and clearly none was "equivalent to a pronouncement from the Bench, that he was guilty of abstracting money from the Bank" (Br. 13), as petitioner contends. The jury were properly informed that they were the sole judges of the facts (R. 472–473). The only substantial fact question involved was the petitioner's good or bad faith, and this question was specifically referred to the jury under an instruction most favorable to the petitioner (R. 474).

## CONCLUSION

Petitioner had a fair trial and the verdict of the jury is supported by ample evidence. No question of importance is presented; there is no conflict of decisions.

We therefore respectfully submit that the petition for writ of certiorari should be denied.

CHARLES FAHY,
*Acting Solicitor General.*
WENDELL BERGE,
*Assistant Attorney General.*
OSCAR A. PROVOST,
*Special Assistant to the Attorney General.*
HARDY K. MACLAY,
*Attorney.*

JULY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941